RECORD AND BRIEF

16-348

No.

Supreme Court, U.S.
FILED
SEP 14 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the Fair Debt Collection Practices Act.

2. Whether the Bankruptcy Code, which governs the filing of proofs of claim in bankruptcy, precludes the application of the Fair Debt Collection Practices Act to the filing of an accurate proof of claim for an unextinguished time-barred debt.

CORPORATE DISCLOSURE STATEMENT

Petitioner Midland Funding, LLC, is a subsidiary of Encore Capital Group, Inc., a publicly held company. Encore Capital Group has no parent corporation, and no publicly held company owns 10% or more of its stock.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Midland Funding, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 823 F.3d 1334. The order of the district court granting petitioner's motion to dismiss (App., *infra*, 18a-37a) is reported at 528 B.R. 462.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2016. A petition for rehearing was denied on August 19, 2016 (App., *infra*, 16a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Relevant provisions of the Bankruptcy Code, 11 U.S.C. 101-1532; the Fair Debt Collection Practices Act, 15 U.S.C. 1692-1692p; and the Federal Rules of Bankruptcy Procedure are reproduced in the appendix to this petition (App., *infra*, 38a-43a).

STATEMENT

This case presents two closely related questions concerning the relationship between two federal statutory schemes. The Bankruptcy Code (Code) entitles a creditor to file a proof of claim in a bankruptcy proceeding; the Code and accompanying rules require the creditor to include certain information in order to enable parties in interest to assess the claim's timeliness, and they provide a remedial scheme to address improper filings. The earlier-enacted Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from engaging in unfair, deceptive, or misleading debt-collection practices. The questions presented by this case are, first, whether a debt collector violates the FDCPA by filing an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding, and, second, whether the Bankruptcy Code precludes such an application of the FDCPA.

Petitioner is a debt purchaser who acquired respondent's defaulted credit card account. When respondent filed for bankruptcy, petitioner filed a proof of claim in respondent's bankruptcy case. The proof of claim accurately listed the amount of the debt and other required

information, including the date of the last transaction on respondent's account. Because the date of the last transaction was more than six years before petitioner's filing, the debt was time-barred under the relevant state law. Respondent objected to petitioner's claim, and the bankruptcy court disallowed it.

Respondent then sued petitioner, alleging that the filing of a proof of claim on a time-barred debt violated the FDCPA. The district court granted petitioner's motion to dismiss. It held, first, that under binding circuit precedent, the filing of a proof of claim on a time-barred debt in a bankruptcy proceeding violates the FDCPA, but, second, that such an application of the FDCPA is precluded by the later-enacted Bankruptcy Code, which allows creditors to file such claims.

The Eleventh Circuit reversed and remanded. Despite agreeing with the district court that the Code allows creditors to file proofs of claim on time-barred debts, the Eleventh Circuit reiterated its prior holding that debt collectors violate the FDCPA when they file such claims, then further held that applying the FDCPA to such conduct does not give rise to an irreconcilable conflict with the Code. The Eleventh Circuit's decision in this case conflicts with decisions of the Fourth, Seventh, and Eighth Circuits, which hold that filing an accurate proof of claim for a time-barred debt in a bankruptcy proceeding does not violate the FDCPA, and is inconsistent with a decision of the Second Circuit holding that the filing of even an invalid proof of claim is not actionable under the FDCPA. The Eleventh Circuit's decision further conflicts with a decision of the Ninth Circuit holding that the Bankruptcy Code broadly precludes the application of the FDCPA to conduct occurring within bankruptcy proceedings, as well as decisions of the Ninth Circuit's Bankruptcy Appellate

Panel applying that holding to reach the specific conclusion that the Code precludes an FDCPA action based on filing a proof of claim for a time-barred debt.

Because the Eleventh Circuit's decision squarely conflicts with the decisions of other circuits on two important questions of federal law, and because this case is an optimal vehicle in which to address those closely related questions, the petition for a writ of certiorari should be granted.

A. Background

1. Enacted in 1978, the Bankruptcy Code governs the distribution of a debtor's estate. Under the Code, "[w]hen a debtor declares bankruptcy, each of its creditors is entitled to file a proof of claim" against the debtor's estate. *Travelers Casualty & Surety Co.* v. *Pacific Gas & Electric Co.*, 549 U.S. 443, 449 (2007); see 11 U.S.C. 501. As is relevant here, the Code defines a "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5)(A). As this Court has repeatedly recognized, that language gives "claim" the "broadest available definition." *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991); see *FCC* v. *NextWave Personal Communications Inc.*, 537 U.S. 293, 302 (2003).

"Once a proof of claim has been filed, the court must determine whether the claim is 'allowed' under [Section] 502(a) of the Bankruptcy Code." *Travelers*, 549 U.S. at 449. By default, a claim is "deemed allowed" unless a party in interest objects. 11 U.S.C. 502(a). In consumer bankruptcies, moreover, the Code provides for the appointment of a trustee, who is required to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. 704(a)(5); 11 U.S.C. 1302(b)(1). If a

trustee or other party in interest objects to a claim, the bankruptcy court must determine whether the claim should be disallowed under any of the "exceptions" listed in the Code. *Travelers*, 549 U.S. at 449; see 11 U.S.C. 502(b).

A debt may be disallowed because it is "unenforceable * * * under any * * * applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. 502(b)(1). In particular, the Code provides that the estate is entitled to any "defense" available to the debtor, "including statutes of limitation." 11 U.S.C. 558. For claims based on open-ended or revolving consumer credit agreements, in order to aid interested parties in "assessing the timeliness of the claim," Fed. R. Bankr. P. 3001 advisory committee's notes (2012), the Federal Rules of Bankruptcy Procedure require the creditor to include certain information in the proof of claim, including the date of the account holder's last transaction; the date of the last payment on the account; and the date the account was charged to profit and loss. See Fed. R. Bankr. P. 3001(c)(3)(A)(iii)-(v).

The Bankruptcy Code has a comprehensive remedial scheme for actions taken in bankruptcy proceedings that bankruptcy courts view as improper. The Code permits a bankruptcy court to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a). And the Federal Rules of Bankruptcy Procedure specifically provide that presenting any document to the court constitutes a certification that the document is not presented "for any improper purpose" and that any "legal contentions * * * are warranted by existing law" or by an argument for modifying the law. Fed. R. Bankr. P. 9011(b).

2. This case concerns the interplay between the Bankruptcy Code and the Fair Debt Collection Practices Act, enacted a year earlier in 1977. The FDCPA bars debt collectors—that is, entities that "regularly collect[] or attempt[] to collect, directly or indirectly," debts owed to another, 15 U.S.C. 1692a(6)—from engaging in certain practices. Specifically, the FDCPA bars debt collectors from using "unfair or unconscionable means to collect or attempt to collect any debt," including "collect[ing] * * * any amount" that is not "expressly * * * permitted by law." 15 U.S.C. 1692f. It also bars debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] * * * the character, amount, or legal status of any debt." 15 U.S.C. 1692e. The FDCPA creates a private right of action for consumers against debt collectors for actual and statutory damages as well as costs (including attorney's fees). See 15 U.S.C. 1692k.

B. Facts And Procedural History

1. In 2014, respondent filed a petition for bankruptcy in the United States Bankruptcy Court for the Southern District of Alabama under Chapter 13 of the Bankruptcy Code. Respondent was represented by counsel in the bankruptcy proceeding, and the bankruptcy court duly assigned a trustee to respondent's case. Petitioner, which had previously purchased a $1,879.71 debt incurred by respondent, filed a corresponding proof of claim in respondent's bankruptcy proceeding. As required by Federal Rule of Bankruptcy Procedure 3001, petitioner's proof of claim accurately listed the date of the last transaction on respondent's account as May 2003. The relevant State for choice-of-law purposes was Alabama, which has a six-year

limitations period, Ala. Code § 6-2-34; that period had expired by the time petitioner filed its proof of claim. Respondent's counsel objected to petitioner's claim, and the bankruptcy court disallowed it. App., *infra*, 3a.

2. Three days after the bankruptcy court disallowed the claim, respondent brought suit against petitioner in the United States District Court for the Southern District of Alabama under the Fair Debt Collection Practices Act. Respondent alleged that, because petitioner's proof of claim related to a time-barred debt, the filing of the proof of claim in respondent's bankruptcy proceeding constituted an unfair, deceptive, or misleading debt-collection practice under the FDCPA. App., *infra*, 3a-4a.

Petitioner moved to dismiss, and the district court granted the motion. App., *infra*, 18a-37a. The district court recognized that it was bound by the Eleventh Circuit's decision in *Crawford* v. *LVNV Funding, LLC*, 758 F.3d 1254 (2014), cert. denied, 135 S. Ct. 1844 (2015), which held that the filing of a proof of claim for a time-barred debt violates the FDCPA. App., *infra*, 19a-20a. But the district court observed that the Eleventh Circuit had left open the question whether the Code precludes such an application of the FDCPA. *Id.* at 20a. The district court agreed with petitioner that it does. *Id.* at 20a-37a. In answering that question, the court observed that, under the relevant state law, the statute of limitations does not extinguish a creditor's right to payment, but instead simply eliminates the creditor's legal remedy to obtain a civil judgment against the debtor. *Id.* at 22a. Analyzing the text of the Code, this Court's precedents, and past bankruptcy practice, the district court determined that the Code permits a creditor to file a proof of claim for an unextinguished time-barred debt. *Id.* at 21a-30a. The district court then determined that there is an irreconcilable

conflict between the Code and the FDCPA, because "comply[ing] with the [FDCPA]" requires "surrendering [petitioner's] right under the Code." *Id.* at 33a. Accordingly, the court concluded that the earlier-enacted FDCPA "must give way to the Code." *Id.* at 37a.

3. The court of appeals reversed and remanded. App., *infra*, 1a-15a.*

The court of appeals first explained that it had decided a "nearly identical" question in *Crawford* and had held, in that case, that "a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred." App., *infra*, 2a, 5a. The court reapplied its holding in *Crawford* on that question. *Id.* at 5a-6a.

The court of appeals then turned to a question it had expressly "left open" in *Crawford*: namely, whether the Bankruptcy Code "preclude[s] an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred." App., *infra*, 7a. At the outset, the court of appeals agreed with the district court that, under the Code, a creditor has a "'right' to file a time-barred claim." *Id.* at 8a. The court explained that "the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations." *Id.* at 7a.

The court of appeals nevertheless concluded that the Code and the FDCPA "can coexist." App., *infra*, 13a. According to the court, the Code and the FDCPA could be "reconciled," because the FDCPA "dictates the behavior

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* The court of appeals considered this case together with another case in which the same district court had subsequently relied on the reasoning of its decision in this case. See App., *infra*, 4a. While the court of appeals addressed both cases in a single opinion, it entered separate judgments in each case. Petitioner is serving courtesy copies of this petition on the parties to that case. Cf. S. Ct. R. 12.6.

of only 'debt collectors,'" a subcategory of the "creditors" covered by the Code, and because the Code "establishes the ability to file a proof of claim," while the FDCPA "addresses the later ramifications of filing a claim." *Id.* at 12a. The court reasoned that there was no "positive repugnancy" between the statutes, because a debt collector that files a proof of claim for a time-barred debt (as authorized under the Code) "is simply opening himself up to a potential lawsuit for an FDCPA violation." *Id.* at 14a (internal quotation marks omitted). In the court of appeals' view, subjecting conduct permitted under the Bankruptcy Code to civil liability under the FDCPA does not give rise to an irreconcilable conflict between the two statutes. *Id.* at 15a.

4. Petitioner filed a petition for rehearing, arguing that the court of appeals' decision in this case (like its prior decision in *Crawford*) conflicted with the decisions of several other circuits. While the rehearing petition was pending, petitioner notified the court of appeals of recent decisions from two other circuits that had expressly declined to follow its reasoning. The court of appeals nevertheless denied rehearing without a single judge calling for a vote on the petition. App., *infra*, 16a-17a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision in this case conflicts with the decisions of at least three other courts of appeals on the question whether the filing of an accurate proof of claim on a time-barred debt violates the FDCPA. The Eleventh Circuit's decision further conflicts with the decision of another court of appeals on the closely related question whether the Bankruptcy Code precludes such an application of the FDCPA. Those conflicts create intolerable discord on important issues of bankruptcy law and

federal statutory interpretation, and they cannot be resolved without the Court's review. Because this case presents an optimal vehicle for addressing and resolving both conflicts, the petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

As multiple courts of appeals have recognized, "[t]here is a circuit split on the issue of whether filing a proof of claim on a stale debt in bankruptcy is a misleading or deceptive act prohibited by the FDCPA." *Owens* v. *LVNV Funding, LLC*, ___ F.3d ___, 2016 WL 4207965, at *5 (7th Cir. Aug. 10, 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016); see *In re Dubois*, ___ F.3d ___, 2016 WL 4474156, at *6 & n.6 (4th Cir. Aug. 25, 2016); *Nelson* v. *Midland Credit Management, Inc.*, ___ F.3d ___, 2016 WL 3672073, at *2 (8th Cir. July 11, 2016). The Fourth, Seventh, and Eighth Circuits have all expressly considered and rejected the Eleventh Circuit's holding in *Crawford* that the filing of a proof of claim for a time-barred debt in a bankruptcy proceeding is actionable under the FDCPA. See *Nelson*, 2016 WL 3672073, at *2; *Owens*, 2016 WL 4207965, at *5-*6; *Dubois*, 2016 WL 4474156, at *6 & n.6. And respondent has expressly conceded the existence of a circuit conflict. See C.A. Resp. Opp. to Mot. to Stay 1 (agreeing that "[petitioner] is correct that the circuits have squarely divided over these issues, and there is at least a 'reasonable probability' of Supreme Court review" (citation omitted)).

In this case, the Eleventh Circuit reinforced the existing circuit conflict by adhering to its holding in *Crawford*, and it created a new circuit conflict by further holding that the Bankruptcy Code does not preclude the application of the FDCPA to the filing of an accurate proof of claim for

a time-barred debt. At least three other courts of appeals would not even recognize an FDCPA claim in such circumstances, and another court of appeals would hold such a claim precluded by the Bankruptcy Code. The district and bankruptcy courts that routinely confront these questions, moreover, are hopelessly divided. This Court's review is thus sorely needed.

1. As to the first question presented—whether the filing of an accurate proof of claim for an unextinguished time-barred debt in a bankruptcy proceeding violates the FDCPA—the Eleventh Circuit's decision in this case (like its prior decision in *Crawford*) squarely conflicts with decisions of the Fourth, Seventh, and Eighth Circuits, and it cannot be reconciled with a decision from the Second Circuit that resolved a similar, albeit broader, question.

a. The Eighth Circuit—the first court of appeals to address the issue after the Eleventh—faced a materially identical factual scenario but reached the opposite conclusion. In *Nelson*, *supra*, an affiliate of the petitioner in this case was sued under the FDCPA for filing a proof of claim on a time-barred debt in a bankruptcy proceeding. See 2016 WL 3672073, at *1. The Eighth Circuit expressly declined to follow the Eleventh Circuit's reasoning, noting that the Eleventh Circuit had "ignore[d] the differences between a bankruptcy claim and actual or threatened litigation." *Id.* at *2. Instead, citing the "protections against harassment and deception" inherent in the bankruptcy process, the Eighth Circuit concluded that "[a]n accurate and complete proof of claim on a time-barred debt is not false, deceptive, misleading, unfair, or unconscionable under the FDCPA." *Ibid.*

The Seventh Circuit addressed the same question in *Owens*, *supra*. Like the Eighth Circuit, the Seventh Circuit "decline[d] to follow the Eleventh Circuit's approach." 2016 WL 4207965, at *6. The Seventh Circuit

first observed that a proof of claim filed under the Bankruptcy Code "does not purport to be anything other than a claim subject to dispute in the bankruptcy case." *Id.* at *5. The court then reasoned that, in light of the various protections for debtors under the Code, concerns about filing a time-barred claim "are less acute" in bankruptcy proceedings than in a lawsuit, and the inclusion of required information about the amount of the claim and the date of the last transaction ensures that the proofs of claim are "not deceptive or misleading." *Id.* at *6. Dissenting, Chief Judge Wood would have held that filing a time-barred proof of claim "violates the FDCPA" and so "would [have] align[ed] th[e] court with the Eleventh Circuit" in the "existing circuit split." *Id.* at *10.

In the most recent circuit decision on this question, the Fourth Circuit joined the majority side of the conflict. In *Dubois*, *supra*, the Fourth Circuit noted that the Eleventh Circuit was "the only court of appeals to hold that filing a proof of claim on a time-barred debt in a Chapter 13 proceeding violates the FDCPA." 2016 WL 4474156, at *6 n.6. The Fourth Circuit began by explaining that, when a statute of limitations does not "extinguish debts" but simply eliminates the remedy, "a time-barred debt falls within the Bankruptcy Code's broad definition of a claim," with the result that the Code "permits such filing." *Id.* at *6. Indeed, the court observed that, from a bankruptcy perspective, the "optimal scenario" is for time-barred proofs of claim to be filed and for "the Bankruptcy Code to operate as written," bringing those claims into the bankruptcy proceeding and then disallowing them. *Ibid.* Describing the myriad differences between a state-court lawsuit filed by a creditor and bankruptcy proceedings initiated by a debtor, the court explained that "the reasons why it is 'unfair' and 'misleading' to sue on a time-barred

debt are considerably diminished in the bankruptcy context." *Id.* at *7. Accordingly, the court disagreed with the Eleventh Circuit and concluded that the filing of such a proof of claim does not violate the FDCPA. See *id.* at *8. Dissenting, Judge Diaz concluded that the conduct was actionable under the FDCPA and, addressing a question not reached by the majority (but resolved in the decision below in this case), further concluded that the Bankruptcy Code does not preclude such an application of the FDCPA. See *id.* at *8-*11.

b. The Eleventh Circuit's decision in this case also cannot be reconciled with a decision of the Second Circuit, which has left no doubt that it would reach the opposite conclusion on the facts presented here. In *Simmons* v. *Roundup Funding, LLC*, 622 F.3d 93 (2d Cir. 2010), the creditor filed an inflated proof of claim in the debtor's bankruptcy proceeding, misstating the amount of the debt owed, and the debtor sued the creditor under the FDCPA. See *id.* at 94-95. The Second Circuit held that the debtor had failed to state a claim. See *id.* at 94. The Second Circuit explained that "[t]here is no need to protect debtors who are already under the protection of the bankruptcy court, and there is no need to supplement the remedies afforded by bankruptcy itself." *Id.* at 96. The Second Circuit concluded that "filing a proof of claim in bankruptcy court (even one that is somehow invalid) cannot constitute the sort of abusive debt collection practice proscribed by the FDCPA." *Id.* at 95. In light of its holding and reasoning in a case involving a proof of claim that was affirmatively misleading, there can be little doubt that the Second Circuit would reach the same result in a case such as this one, where the proof of claim was in fact accurate.

2. In addition to the widely acknowledged conflict on the first question presented, the Eleventh Circuit's deci-

sion in this case created a further conflict on a closely related second question—whether, if the filing of a proof of claim on a time-barred debt violates the FDCPA, the Bankruptcy Code precludes the FDCPA's application.

In the decision under review, the Eleventh Circuit held that the Bankruptcy Code can coexist with an FDCPA claim based on a time-barred proof of claim. See App., *infra*, 10a-15a. The Ninth Circuit, however, has reached the opposite conclusion, broadly holding that the Code displaces the FDCPA in the context of bankruptcy proceedings. In *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), the debtor sued a creditor under the FDCPA for attempting to collect a discharged debt in a Chapter 7 bankruptcy. See *id.* at 504. The Ninth Circuit held that no claim would lie, on the ground that "permit[ting] a simultaneous claim under the FDCPA" would "circumvent the remedial scheme of the Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies." *Id.* at 510. The court explained that, once a debtor is in bankruptcy, "the debtor's protection and remedy remain under the Bankruptcy Code," and "[n]othing in either [the Code or the FDCPA] persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA." *Ibid.*

Under the Ninth Circuit's reasoning in *Walls*, application of the FDCPA to the filing of a proof of claim—conduct similarly governed by the Code—would plainly be precluded. Indeed, applying *Walls*, the Ninth Circuit Bankruptcy Appellate Panel has so held in two separate cases. The first case involved a creditor's proof of claim for a debt that the debtor maintained was time-barred and invalid. See *In re Chaussee*, 399 B.R. 225, 227 (B.A.P. 9th Cir. 2008). After "assum[ing]" that the conduct at issue constituted a violation of the FDCPA, see *id.* at 235 n.12,

the Bankruptcy Appellate Panel held that the "Code precludes the application of the FDCPA under these facts." *Id.* at 235. The court reasoned that the Code and the FDCPA have different and conflicting requirements for asserting a debt, see *id.* at 237-238, and it observed that "the [Bankruptcy] Code and Rules are up to the task of compensating a debtor for any damages or costs occasioned by, and to punish and deter, those who would abuse the bankruptcy claims process," *id.* at 241.

The second case, *In re McCarther-Morgan*, No. 08-1093, 2009 WL 7810817 (B.A.P. 9th Cir. Jan. 27, 2009), aff'd, 373 Fed. Appx. 778 (9th Cir. 2010) (mem.), similarly considered a proof of claim for a debt that, according to the debtor, was time-barred and invalid. See *id.* at *1. The Bankruptcy Appellate Panel held that the Code precluded the application of the FDCPA, reasoning that "it is not possible to reconcile both the Bankruptcy Code[,] which authorizes the filing of proofs of claim, and the FDCPA[,] which, [the debtor] argues, prohibits the filing of certain proofs of claim." *Id.* at *13.

In addition, while the second question presented generally arises in courts that have held, as to the first question, that the filing of a proof of claim on a time-barred debt violates the FDCPA, numerous district and bankruptcy courts have addressed the second question and reached conflicting results—including several courts whose decisions were effectively reversed by the Eleventh Circuit in the opinion below. Compare, *e.g.*, *Mears* v. *LVNV Funding, LLC*, 541 B.R. 899, 905 (M.D. Fla. 2015); *Lewis* v. *LVNV Funding, LLC*, Civ. No. 15-61313, 2015 WL 5819992, at *1 (S.D. Fla. Oct. 6, 2015); *Middlebrooks* v. *Interstate Credit Controls, Inc.*, 391 B.R. 434, 437 (D. Minn. 2008); *In re Moses*, 542 B.R. 5, 12 (Bankr. N.D. Ala. 2015) (holding that the Code precludes such an application of the FDCPA), with, *e.g.*, *Carranza* v. *Midland Funding,*

LLC, Civ. No. 15-559, 2015 WL 5008462, at *5 (E.D. Mo. Aug. 20, 2015); *Grandidier* v. *Quantum3 Group, LLC*, Civ. No. 14-138, 2014 WL 6908482, at *2 (S.D. Ind. Dec. 8, 2014); *In re Perkins*, 533 B.R. 242, 255 (Bankr. W.D. Mich. 2015); *In re Marcinowski*, No. 13-33571, 2015 WL 3524977, at *4 (Bankr. N.D. Ill. June 2, 2015) (holding that the Code does not preclude such an application of the FDCPA). In light of that substantial body of authority, the reasoning on both sides of the second question, as with the first, is thoroughly developed.

3. The circuit conflicts on the closely related questions presented in this case are ripe for the Court's review. In its decision in this case, the Eleventh Circuit reaffirmed its position on the first question and unambiguously staked out its position on the second. In seeking rehearing, moreover, petitioner informed the Eleventh Circuit of all the decisions from other circuits discussed above (with the exception of the Fourth Circuit's subsequent decision in *Dubois*), yet the Eleventh Circuit denied rehearing without a single judge calling for a vote on the petition. See App., *infra*, 16a-17a. As a result, there is no realistic prospect that the circuit conflicts will resolve without the Court's intervention. Further review is therefore warranted.

B. The Questions Presented Are Important Ones That Warrant Review In This Case

The questions presented in this case are of exceptional legal and practical importance for debtors, creditors, and the bankruptcy system. This case, which cleanly and clearly presents both relevant questions, is the optimal vehicle for the Court's review.

1. As an initial matter, the existence of disparate rules in different circuits governing the same conduct is of significant practical importance for institutional creditors

such as petitioner. As matters currently stand, petitioner would be shielded from FDCPA liability for filing an accurate proof of claim on a time-barred debt as allowed by the Bankruptcy Code in the Fourth, Seventh, Eighth, and Ninth Circuits (and likely the Second Circuit as well), but would be exposed to liability in the Eleventh Circuit. In fact, petitioner and its affiliates are defendants in cases on both sides of the conflict: the Eighth and Eleventh Circuits have explicitly disagreed on whether Midland entities may be subject to FDCPA liability for materially identical conduct. Compare *Nelson*, 2016 WL 3672073, at *2, with App., *infra*, 15a.

As commentators have observed, "the bankruptcy system cannot continue to proceed with such significant rifts between circuits." Sean Peter Doran, *Bringing Bankruptcy Back: Reconciling the Bankruptcy Code and the Fair Debt Collection Practices Act*, Norton Annual Survey of Bankruptcy Law (Sept. 2016); see Brittany M. Dant, Comment, *Down the Rabbit Hole:* Crawford v. LVNV Funding, LLC, *Upends the Role of the Fair Debt Collection Practices Act in Consumer Bankruptcy*, 66 Mercer L. Rev. 1067, 1079 (2015) (warning of the potential for "major ramifications throughout the field of bankruptcy law" from the Eleventh Circuit's decision in *Crawford*). That situation is particularly untenable for nationwide entities such as petitioner and its affiliates, which file tens of thousands of claims in bankruptcies across the country every year. See American InfoSource, *AIS Insight 2015 Year in Review* 14 <tinyurl.com/AISTopCreditors> (noting that petitioner and its affiliates filed 92,580 claims in bankruptcies in 2015, amounting to more than $300 million).

Indeed, uniform interpretation is fundamental to the proper administration of the bankruptcy system, as the Constitution acknowledges by granting Congress power

"[t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4; see *Railway Labor Executives' Association* v. *Gibbons*, 455 U.S. 457, 471-472 (1982). Accordingly, this Court routinely grants review even on shallow circuit conflicts where the question presented concerns the correct interpretation or application of the Bankruptcy Code. See, *e.g.*, *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015); *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014); *Hall* v. *United States*, 132 S. Ct. 1882, 1886 & n.1 (2012). Here, the Eleventh Circuit's approach is out of step with at least four other circuits, resulting in intolerable disuniformity. The significance of the questions presented in both practical and legal terms is undeniable.

2. This case constitutes an optimal vehicle for resolving the circuit conflicts. It easily satisfies the standard criteria for certiorari: the relevant facts are undisputed, the questions presented were raised below, and the court of appeals passed upon both questions in reaching its decision. There is thus no impediment to this Court's reaching and resolving the questions in this case.

Perhaps most importantly, this case presents both of the questions squarely and in depth. Because this case arises from the only court of appeals to have held that the filing of a proof of claim for a time-barred debt is actionable under the FDCPA, the decision below uniquely presents both the question whether the filing of such a claim violates the FDCPA and the question whether the Bankruptcy Code precludes such application of the FDCPA. These questions are closely related and involve the interpretation of overlapping statutory provisions.

It is essential to review both legal questions in order to answer the real-world question that underlies them: can a debtor sue a creditor under the FDCPA for filing an accurate proof of claim for a time-barred debt? Should

the Court resolve the circuit conflict on the first legal question in debtors' favor, it would have to address the second legal question in order conclusively to resolve the real-world question and provide the clarity that debtors, creditors, and courts sorely need. There would be little value (except perhaps for authors of law-review notes) in resolving the first question but leaving the second one hanging. And in addition to the Eleventh Circuit's prior decision analyzing the first question, the Eleventh Circuit and the district court in this case thoroughly analyzed the second question, setting out the opposing viewpoints and analysis in detail.

In short, the Eleventh Circuit's decision in this case solidifies a widely recognized conflict on the question whether the filing of an accurate proof of claim for a time-barred debt in a bankruptcy proceeding violates the FDCPA, and it creates a conflict on the closely related question whether such an application of the FDCPA is precluded by the Bankruptcy Code. Those questions are undeniably important and recurring, and this case is an optimal vehicle for considering them. The Court should grant the petition for certiorari and conclusively resolve whether a debtor can sue a creditor under the FDCPA for filing an accurate proof of claim for a time-barred debt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2016

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11240

ALEIDA JOHNSON, f.k.a. Aleida Hill, individually and on behalf of all similarly situated individuals,
Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC, Defendant-Appellee.

No. 15-14116

JUDY N. BROCK, individually and on behalf of a class of others similarly situated, DONALD CUNNINGHAM,
Plaintiffs-Appellants,

v.

RESURGENT CAPITAL SERVICES, L.P., LVNV FUNDING, LLC, Defendants-Appellees.

Filed: May 24, 2016

Before: WILSON, MARTIN and HIGGINBOTHAM,* Circuit Judges.

OPINION

MARTIN, Circuit Judge.

Under the Bankruptcy Code ("Code"), a "creditor . . . may file a proof of claim" in a bankruptcy proceeding. 11 U.S.C. § 501(a). The Fair Debt Collection Practices Act ("FDCPA") prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This Court held that a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred. *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1261 (11th Cir. 2014). In considering this case below, the District Court interpreted the *Crawford* ruling as having placed the FDCPA and the Code in irreconcilable conflict. We see no such conflict. Although the Code certainly allows all creditors to file proofs of claim in bankruptcy cases, the Code does not at the same time protect those creditors from all liability. A particular subset of creditors—debt collectors—may be liable under the FDCPA for bankruptcy filings they know to be time-barred. Because we find no irreconcilable conflict between the FDCPA and the Code, we reverse.

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*Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

I.

Aleida Johnson filed a Chapter 13 bankruptcy petition in March 2014. In May 2014, Midland Funding, LLC ("Midland") filed a proof of claim in her case, seeking payment of $1,879.71. Midland is a buyer of unpaid debt. Specifically, Midland purchases accounts with overdue unpaid balances and tries to collect those accounts. Midland's claim against Ms. Johnson originated with Fingerhut Credit Advantage, and the date of the last transaction on her account was listed as May 2003. This was over ten years before Ms. Johnson filed for bankruptcy. The claim arose in Alabama, where the statute of limitations for a creditor to collect an overdue debt is six years. *See* Ala. Code § 6-2-34.

Judy Brock also filed a Chapter 13 bankruptcy petition. Ms. Brock filed her petition in April 2014; in June 2014, Resurgent Capital Services, L.P. ("Resurgent") filed a proof of claim seeking payment of $4,155.40. Resurgent is a "manager and servicer of domestic and international consumer debt portfolios for credit grantors and debt buyers." Resurgent's filing was an attempt to collect Ms. Brock's debt on behalf of LVNV Funding, LLC, which is a purchaser of unpaid debt like Midland. Ms. Brock's debt originated with Washington Mutual Bank, N.A., and the date of the last transaction on her account was January 2008. There had been no activity on her account for over six years before Ms. Brock filed for bankruptcy.

Ms. Johnson and Ms. Brock (together, "Debtors") sued their respective creditors (together, "Claimants") under the FDCPA. The FDCPA provides that "[a] debt collector may not use any false, deceptive, or misleading

representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This includes attempting to collect a debt that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f(1). Both Debtors alleged in their lawsuits that the claims on their face were barred by the relevant statute of limitations. They argued that the proofs of claim were thus "'unfair,' 'unconscionable,' 'deceptive,' and misleading" in violation of the FDCPA.

Midland moved to dismiss Ms. Johnson's FDCPA suit, and the District Court granted the motion. The District Court read the Bankruptcy Code as affirmatively authorizing a creditor to file a proof of claim—including one that is time-barred—if that creditor has a "right to payment" that has not been extinguished under applicable state law. The District Court identified tension between this provision of the Code and the FDCPA, which makes it unlawful to file a proof of claim known to be time-barred. The court found this conflict to be irreconcilable and applied the doctrine of implied repeal to hold that a creditor's right to file a time-barred claim under the Code precluded debtors from challenging that practice as a violation of the FDCPA in the Chapter 13 bankruptcy context.

In Ms. Brock's later FDCPA suit, the District Court granted Resurgent's motion for judgment on the pleadings based on the rationale and holding in Ms. Johnson's case. The two cases were consolidated for this appeal.

II.

We review *de novo* the District Court's grant of a motion to dismiss for failure to state a claim. *Lanfear v. Home Depot, Inc.*, 679 F.3d 1267, 1275 (11th Cir. 2012).

Like the District Court, we accept the allegations in the complaint as true and construe the facts in the light most favorable to the plaintiff. *Id.* We apply the same standard of review to the District Court's judgment on the pleadings. *See Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002). Judgment on the pleadings is appropriate "when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996).

III.

The Debtors argue on appeal that the District Court's decision conflicts with our Circuit's precedent in *Crawford*. Again, *Crawford* held that a debt collector violates the FDCPA by knowingly filing a proof of claim in a bankruptcy proceeding on a debt that is time-barred. 758 F.3d at 1261. The Debtors here pursue their argument that the Code does not preclude this type of FDCPA claim simply because the claim was made in the context of a Chapter 13 bankruptcy case.

A.

In *Crawford*, this Court faced a question nearly identical to the one we consider here: "whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates the [FDCPA]." 758 F.3d at 1256. We concluded there was an FDCPA violation in *Crawford*, based on "[t]he FDCPA's broad language, our precedent, and the record." *Id.* at 1257.

The *Crawford* panel first looked to the language of the FDCPA, which prohibits a "false, deceptive, or misleading representation," 15 U.S.C. § 1692e, or "unfair or unconscionable means," *id.* § 1692f, to collect on a debt.

758 F.3d at 1258. Because of the ambiguity in these terms, the Court adopted a "'least-sophisticated consumer' standard" to evaluate whether a debt collector's conduct was deceptive under the FDCPA. *Id.* It then concluded that "[s]imilar to the filing of a stale lawsuit," which is prohibited by the FDCPA for debts on which the statute of limitations has run, "a debt collector's filing of a time-barred proof of claim creates the misleading impression to the debtor that the debt collector can legally enforce the debt." *Id.* at 1261. This impression causes problems because "[t]he 'least sophisticated' Chapter 13 debtor may be unaware that a claim is time barred and unenforceable and thus fail to object to such a claim." *Id.* Then when the debtor fails to object, the time-barred debt becomes part of the debtor's repayment plan, which would "necessarily reduce[] the payments to other legitimate creditors with enforceable claims." *Id.* Thus *Crawford* held that the practice of filing time-barred proofs of claim was misleading under the FDCPA. *Id.*

In a footnote, the panel said it "decline[d] to weigh in on a topic the district court artfully dodged: Whether the Code 'preempts' the FDCPA when creditors misbehave in bankruptcy." *Id.* at 1262 n. 7. The Court said it "need not address this issue" because the claimant there "argue[d] only that its conduct does not fall under the FDCPA, or, alternatively, did not offend the FDCPA's prohibitions" and it "d[id] not contend that the Bankruptcy Code displaces or 'preempts' §§ 1692e and 1692f of the FDCPA." *Id.*

B.

We now answer the question left open in *Crawford*. The Bankruptcy Code does not preclude an FDCPA claim in the context of a Chapter 13 bankruptcy when a debt collector files a proof of claim it knows to be time-barred. We recognize that the Code allows creditors to file proofs of claim that appear on their face to be barred by the statute of limitations. However, when a particular type of creditor—a designated "debt collector" under the FDCPA—files a knowingly time-barred proof of claim in a debtor's Chapter 13 bankruptcy, that debt collector will be vulnerable to a claim under the FDCPA. Our examination of these statutes leads us to conclude that the Code and the FDCPA can be read together in a coherent way.

1.

Under the Bankruptcy Code, a "creditor . . . may file a proof of claim" in a debtor's bankruptcy. 11 U.S.C. § 501(a). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 101(5)(A). The Supreme Court interprets this language to create an "entitle[ment]" for creditors to file a proof of claim in a bankruptcy proceeding where a "right to payment" exists. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 449, 127 S. Ct. 1199, 1204 (2007) (quotation omitted). A "right to payment" under the Bankruptcy Code "is nothing more nor less than an enforceable obligation." *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559, 110 S. Ct. 2126, 2131 (1990).

The Debtors argue that there is no "right" to file a time-barred claim when there is no right to have that claim repaid in a Chapter 13 bankruptcy proceeding. We reject this argument, because the Code does allow claims in a Chapter 13 bankruptcy proceeding by a party who does not necessarily have a right to have his claim paid. *See In re McLean*, 794 F.3d 1313, 1321 (11th Cir. 2015) ("[T]he Bankruptcy Code explicitly contemplates that creditors may file unenforceable claims in the bankruptcy court."). And having a claim is not the same as being entitled to a remedy. Indeed, Alabama law, which governs the right of the Claimants to recover here, provides that "[w]hen the statute of limitations expires, it does not extinguish the cause of action; instead, it makes the remedy unavailable." *In re HealthSouth Corp.*, 974 So. 2d 288, 296 (Ala. 2007). So although a party may not be able to enforce its claim because of a statute-of-limitations bar, that party still may assert the claim in the first place. *See id.*

As the District Court pointed out, the Bankruptcy Code's procedure for addressing proofs of claim demonstrates that some filed claims will not ultimately be paid in a bankruptcy proceeding. Where a proof of claim is filed in a bankruptcy case, that claim is generally "deemed allowed," so it will be viewed as a valid claim and paid out of the bankruptcy estate. 11 U.S.C. § 502(a). However, the bankruptcy trustee is charged with "examin[ing] proofs of claim and object[ing] to the allowance of any claim that is improper." *Id.* § 704(a)(5); *see also id.* at § 1302(b)(1). Once the trustee objects, the bankruptcy court is in turn charged with determining whether the claim "is unenforceable against the debtor . . . under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." *Id.*

§ 502(b)(1); *see also id.* § 558 ("The [bankruptcy] estate shall have the benefit of any defense available to the debtor . . . including statutes of limitation."). Thus, where the bankruptcy process is working as intended, a time-barred proof of claim may be filed but will not be paid by the bankruptcy estate.

2.

So while we recognize that creditors can file proofs of claim they know to be barred by the relevant statute of limitations, those creditors are not free from all consequences of filing these claims. The FDCPA does not allow a debt collector to "use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Neither may they "use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. A debt collector who violates one of these rules may face civil liability to the debtor. *Id.* § 1692k. As this Court recognized in *Crawford*, a debt collector violates the FDCPA by filing a knowingly time-barred proof of claim in a Chapter 13 bankruptcy proceeding. 758 F.3d at 1261.

Of course, the FDCPA does not reach all creditors. The statute applies only to "debt collectors," who are defined as "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). And "debt collectors" are a narrow subset of the universe of creditors who might file proofs of claim in a Chapter 13 bankruptcy. Under the Code, any "creditor" (defined as any "entity that has a claim against the debtor that arose at the time of or before the [bankruptcy] order") may file a proof of claim. 11 U.S.C.

§ 101(10)(A). So not all "creditors" who file a proof of claim in a Chapter 13 bankruptcy case can face potential FDCPA liability as "debt collectors."

Also, the FDCPA provides a safe harbor for debt collectors who might unintentionally or in good faith file such a claim. *See* 15 U.S.C. § 1692k(c). A debt collector who appears to have violated the FDCPA can avoid liability by showing (by a preponderance of evidence) that their violation "was not intentional and resulted from a bona fide error." *Id.* These two requirements—that the claim be filed by a "debt collector" and that the claim be "knowingly" time-barred—limit application of the FDCPA to a narrow range of actors and claims.

3.

The District Court found an "obvious tension" between the Bankruptcy Code and the FDCPA because "the Code permits creditors to file proofs of claim in Chapter 13 proceedings on debts known to be time-barred, while the Act prohibits debt collectors from engaging in such conduct." Based on its perception that this is an "irreconcilable conflict," the District Court found that the later-enacted Code impliedly repealed the earlier-enacted FDCPA. In that court's view, this prohibited the Debtors from seeking FDCPA remedies against the Claimants who had filed proofs of claim in their Chapter 13 bankruptcy cases.

Where two federal statutes conflict, a cause of action provided by one statute may be precluded by the provisions of the other. *See POM Wonderful LLC v. Coca-Cola Co.*, ___ U.S. ___, 134 S. Ct. 2228, 2236 (2014). Where there is such an "irreconcilable conflict, the later act to the extent of the conflict constitutes an implied re-

peal of the earlier one." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503, 56 S. Ct. 349, 352 (1936) (quotation omitted). However, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662, 127 S. Ct. 2518, 2532 (2007) (quotations omitted) (alteration adopted).

This is to say that courts must be modest in construing a repeal by implication. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44, 122 S. Ct. 593, 605 (2001) (quotation omitted). For irreconcilable conflict to exist there must usually be some sort of "positive repugnancy" between the statutes at issue, because two statutes can typically coexist if they simply contain "different requirements and protections." *Id.* We will not infer a statutory repeal unless either the later statute expressly contradicts the earlier statute or this construction "is absolutely necessary" in order for the later statute to "have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The FDCPA and the Code are not in irreconcilable conflict. The FDCPA and the Code differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist. *See POM Wonderful LLC*, 134 S. Ct. at 2238 (finding two federal statutes complementary to each other when they touched on the same general subject matter but each "ha[d] its own scope and purpose" and "impose[d] different require-

ments and protections" (quotation omitted)). There is no "positive repugnancy" between the statutes, because reading the two statutes as we described does not create such an express contradiction that implied repeal of the FDCPA "is absolutely necessary" in order for § 501(a) of the Bankruptcy Code (which creates the right to file a claim) to "have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662, 127 S. Ct. at 2532 (quotations omitted).

The Bankruptcy Code and the FDCPA can be reconciled because they provide different protections and reach different actors. *See J.E.M. Ag Supply, Inc.*, 534 U.S. at 142, 122 S. Ct. at 604 (finding no irreconcilable conflict where two regimes regulate at different levels of stringency and provide varying amounts of protection). The Code allows all "creditors" to file proofs of claim, *see* 11 U.S.C. § 101(10)(A), while the FDCPA dictates the behavior of only "debt collectors" both within and outside of bankruptcy, *see* 15 U.S.C. § 1692a(6). The Code establishes the ability to file a proof of claim, *see* 11 U.S.C. § 105(a), while the FDCPA addresses the later ramifications of filing a claim, *see Crawford*, 758 F.3d at 1257.

We read these regimes together as providing different tiers of sanctions for creditor misbehavior in bankruptcy. *Cf. POM Wonderful LLC*, 134 S. Ct. at 2238 ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."). In a Chapter 13 bankruptcy proceeding, the first potential line of protection against a creditor who files a time-barred proof of claim is for the bankruptcy trustee to object to the claim

during the course of the bankruptcy proceedings. *See* 11 U.S.C. §§ 704(a)(5), 1302(b)(1). If the bankruptcy court finds the objection to be proper, it can deny payment of the claim. *See id.* § 502(b)(1). Where a creditor's misbehavior is more severe, the Code provides a more powerful remedy. Bankruptcy courts have the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]," such as issuing sanctions against a party for misbehavior. *Id.* § 105(a).

The FDCPA easily lies over the top of the Code's regime, so as to provide an additional layer of protection against a particular kind of creditor. It kicks in only when the creditor is a debt collector that "regularly collects" or is in "any business the principal purpose of which is the collection" of debts. 15 U.S.C. § 1692a(6). And even then, the requirement for finding a violation is quite stringent—the creditor's behavior must reach the point of "unconsionab[ility]" or "decepti[on]." *Id.* §§ 1692e, 1692f. It is only under these circumstances that the FDCPA offers the severe remedy of civil liability for damages to the debtor. *See id.* § 1692k(a).

We thus conclude that the FDCPA and the Code can coexist. Our holding does not infringe any creditor's ability to file a claim in a debtor's bankruptcy proceeding. However, when a debt collector, as specifically defined by the FDCPA, files a proof of claim for a debt that the debt collector knows to be time-barred, that creditor must still face the consequences imposed by the FDCPA for a "misleading" or "unfair" claim. The Bankruptcy Code's rules about who can file claims do not shield debt collectors from the obligations that Congress imposed on them.

We reject the Claimants' assertion that potential consequences under the FDCPA for filing a time-barred proof of claim effectively forces a debt collector to "surrender[ ] its right to file a proof of claim." This argument misunderstands the relationship between the two statutes. There is no blanket prohibition on filing a time-barred claim in bankruptcy, and we say nothing to the contrary here.[1] In the same way, the Bankruptcy Code does not require any creditor to file a proof of claim in a bankruptcy proceeding—it only allows it. *See* 11 U.S.C. § 501(a). If a debt collector chooses to file a time-barred claim, he is simply opening himself up to a potential lawsuit for an FDCPA violation. This result is comparable to a party choosing to file a frivolous lawsuit. There is nothing to stop the filing, but afterwards the filer may face sanctions. *See* Fed. R. Civ. P. 11(b)-(c).

In closing, we observe that our conclusion that there is no "positive repugnancy" between the FDCPA and the Bankruptcy Code is bolstered by two additional facts. First, no provision in either the FDCPA or the Code "purports to govern the relevant interaction between the [two statutes]." *POM Wonderful LLC*, 134 S. Ct. at 2237. Second, Congress never expressed a "clear and manifest intent" to repeal the protections of the FDCPA when it enacted the Bankruptcy Code only one year later. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 662, 127 S. Ct. at 2532. Because the FDCPA and the Bankruptcy Code

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[1] Such an outcome would be inappropriate, because the FDCPA recognizes and provides a safe harbor for creditors who may file proofs of claim that are time-barred, if those filings arose from a good-faith belief resulting from a recording error that the statute of limitations had not in fact run on the claim. *See* 15 U.S.C. § 1692k(c).

may be read to coexist, the Code does not preclude an FDCPA claim in the bankruptcy context.

IV.

This dispute reveals no irreconcilable conflict between the Bankruptcy Code and the FDCPA. A creditor may file a proof of claim in a Chapter 13 bankruptcy proceeding under the Code. However, when that creditor is also a "debt collector" as defined by the FDCPA, the creditor may be liable under the FDCPA for "misleading" or "unfair" practices when it files a proof of claim on a debt that it knows to be time-barred, and in doing so "creates the misleading impression to the debtor that the debt collector can legally enforce the debt." *Crawford*, 758 F.3d at 1261. Because the Debtors' FDCPA claims are not precluded by the Bankruptcy Code, we reverse and remand to the District Court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11240-EE

ALEIDA JOHNSON, f.k.a. Aleida Hill, individually and on behalf of all similarly situated individuals,
Plaintiff-Appellant,

v.

MIDLAND FUNDING, LLC, Defendant-Appellee.

Filed: August 19, 2016

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, MARTIN and HIGGINBOTHAM*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are **DENIED** and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

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*Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

/s/ Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

No. 14-0322-WS-C

ALEIDA Q. JOHNSON, etc.,
Plaintiff,

v.

MIDLAND FUNDING, LLC, Defendant.

Signed: March 23, 2015

ORDER

WILLIAM H. STEELE, Chief Judge.

This matter is before the Court on the defendant's motion to dismiss. (Doc. 17). The parties have filed briefs in support of their respective positions, (Docs. 17, 21, 22, 25, 27), and the motion is ripe for resolution. After careful consideration, the Court concludes the motion is due to be granted.

BACKGROUND

According to the complaint, (Doc. 1), the plaintiff filed for bankruptcy relief under Chapter 13. The defendant

then filed a proof of claim that disclosed on its face that the claim is barred by the statute of limitations. The complaint alleges that this filing violated the Fair Debt Collection Practices Act ("the Act"), in that it was deceptive and misleading for purposes of 15 U.S.C. § 1692e and unfair and unconscionable for purposes of 15 U.S.C. § 1692f.

In *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), the Eleventh Circuit "consider[ed] whether a proof of claim to collect a stale debt in Chapter 13 bankruptcy violates" the Act and "answer[ed] this question affirmatively." *Id.* at 1256-57. The defendant argues that dismissal nevertheless is required on two grounds: (1) "[a]ny claim Johnson might otherwise assert under the [Act] in this case is precluded by the Bankruptcy Code"; and (2) "[e]ven if Johnson's claim were not precluded by the Bankruptcy Code, she still fails to state a claim under the [Act]." (Doc. 17 at 5, 16).

DISCUSSION

"There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995). The Court's review on this motion to dismiss is similarly limited to those arguments the parties have expressly advanced. *E.g., Jurich v. Compass Marine, Inc.*, 906 F. Supp. 2d 1225, 1228 (S.D. Ala. 2012).

The defendant's second argument is essentially an extended and futile effort to deny and thereby avoid the ruling in *Crawford*. The only serious question presented by the defendant's motion is whether tension between the Bankruptcy Code ("the Code") and the Act precludes

the plaintiff from pursuing her claim under the Act.[1] That issue was not presented in *Crawford*, and the Eleventh Circuit expressly declined to consider it. 758 F.3d at 1262.

"The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *accord J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 143-44 (2001). There are various ways of measuring and resolving the tension between federal statutes, but the parties agree to use the test requiring "irreconcilable conflict" between the provisions. (Doc. 17 at 4-5, 7, 16; Doc. 21 at 3, 7-12, 16, 18, 21; Doc. 22 at 1, 3, 7, 9).

Before deciding whether the Act and the Code are in irreconcilable conflict, the Court must determine what each provides. The Act, as construed by *Crawford*, provides that it is unlawful for a debt collector to file a proof of claim in a Chapter 13 proceeding knowing the claim to be time-barred.[2] As discussed below, the Code provides

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[1] Litigants and courts sometimes use the word "preemption" in describing such an issue. Preemption, however, is properly used when assessing the impact of a federal statute on a state law; preclusion is the correct term when two federal statutes are involved. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236 (2014).

[2] "Given our precedent, we must examine whether LVNV's conduct—filing and trying to enforce in court a claim known to be time-barred—would" violate the Act. 758 F.3d at 1259. "[W]e hold that LVNV's conduct violated the FDCPA's plain language . . . ." *Id.* at 1262.

that it is permissible for a creditor to file such a proof of claim if expiration of the limitations period does not extinguish the creditor's right to payment under applicable state law.

"A creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). Pursuant to this provision, "[w]hen a debtor declares bankruptcy, each of its creditors is entitled to file a proof of claim . . . ." *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443, 449 (2007).

"In this title . . . 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." 11 U.S.C. § 101(5)(A). Thus, if a creditor has a right to payment he has a claim, and if he has a claim he is entitled to file a proof of claim.

"The basic federal rule in bankruptcy is that state law governs the substance of claims . . . ." *Travelers*, 549 U.S. at 450 (internal quotes omitted). This flows naturally from the proposition that "property interests are created and defined by state law, and unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 451 (internal quotes omitted). "Accordingly, when the Bankruptcy Code uses the word 'claim'—which the Code itself defines as a 'right to payment,' [citation omitted]—it is usually referring to a right to payment recognized under state law." *Id.* Thus, if a creditor has a right to payment (i.e., a property interest) recognized by applicable state law despite the

lapse of the limitations period, he has a claim for such time-barred debt and is entitled to file a proof of claim as to such time-barred debt.

The plaintiff identifies Alabama as providing the applicable state law. (Doc. 21 at 1 n. 1). In Alabama, a creditor's right to payment is not eliminated by a limitations bar. *Ex parte Liberty National Life Insurance Co.*, 825 So. 2d 758, 765 (Ala. 2007) ("[A] statute of limitations generally is procedural and extinguishes the remedy rather than the right .... ") (internal quotes omitted).[3] Thus, the defendant has a right to payment of its time-barred debt and a consequent entitlement to file a proof of claim as to the time-barred debt.

The plaintiff, while ignoring the Court's analysis, insists that the Code does not "condon[e] ... the filing of proofs of claim on patently unenforceable debt." (Doc. 21 at 8). According to the plaintiff, Section 101(5) requires a "*bona fide* 'right to payment,'" which she defines as a "legally enforceable right." (*Id.* at 2, 17).[4] The defendant

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[3] *Accord Ex parte HealthSouth Corp.*, 974 So. 2d 288, 296 (Ala. 2007) ("When the statute of limitations expires, it does not extinguish the cause of action; instead, it makes the remedy unavailable."); *Pinigis v. Regions Bank*, 942 So. 2d 841, 848 (Ala. 2006) ("The whole theory of a nonclaim statute is to create a defense broader in its operation than the statute of limitations, not only barring remedies, but extinguishing debts and liabilities.") (emphasis and internal quotes omitted).

[4] The plaintiff also argues that the Code "discourages" the filing of stale proofs of claim in that the claim form requires the claimant to declare under penalty of perjury that the debtor owes the creditor money and that the claim is warranted by existing law or a non-frivolous argument for its alteration, and in that the form warns that false claims can be penalized. (Doc. 21 at 17-18, 19). Even if the dis-

scoffs that the plaintiff has pulled this definition of a "right" from a legal dictionary. (Doc. 22 at 8). And so she has, but the Supreme Court itself, in construing Section 101(5), has declared that "[t]he plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation . . . ." *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 559 (1990).[5]

Mr. Black[6] provides seven definitions of a "right," but the plaintiff quotes only one part of one definition. The entirety of that (fourth) definition reads as follows: "A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong <a breach of duty that infringes one's right>." *Black's Law Dictionary* 1436 (9th ed. 2009). It is plain from this definition that "legally enforceable" means only that the law "recognize[s] and protect[s]" the interest giving rise to the claim, that is, that the claim is not a mere moral obligation or idiosyncratic opinion with which the law is not concerned. This dichotomy is made even clearer by Mr. Black's second definition, which defines a "right" as "[s]omething that is due to a person by just claim, legal guarantee, *or* moral

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couragement of a permitted practice had any relevance, these requirements do not discourage the filing of proofs of claim on time-barred debt like the plaintiff's since, as discussed above, under Alabama law a creditor is still owed the debt after the statute of limitations expires.

[5] *Accord Federal Communications Commission* v. *NextWave Personal Communications Inc.*, 537 U.S. 293, 302-03 (2003); *Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998); *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991).

[6] Henry Campbell Black, father of the law dictionary bearing his name.

principle . . . . " *Id.* (emphasis added).[7] It is equally plain that a right is "legally enforceable" in this sense whether or not the defendant can successfully assert an affirmative defense such as the statute of limitations.[8] So long as the law recognizes and protects the interest at issue (here, the interest in being repaid a contractual debt), the resulting claim is legally enforceable even if the law's protection is not limitless in time or scope.

There is no indication that the Supreme Court has used the term "enforceable obligation" in any more restrictive sense than Mr. Black has used the parallel term "legally enforceable claim." The question presented in *Davenport* was whether restitution obligations imposed in state criminal proceedings are "debts" as defined by 11 U.S.C. § 101(11). Because "debt" means "liability on a claim," *id.*, the Court looked to the definition of "claim." The petitioners argued in part that a restitution order

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[7] Courts have often juxtaposed "moral" and "legally enforceable" obligations. *E.g., Kern v. Kern*, 360 So. 2d 482, 485 (Fla. App. 1978) ("Although a parent may suffer a moral obligation to assist children in acquiring an advanced education, we find nothing in either the jurisprudence or the statutes of this state which makes such a moral obligation legally enforceable."); *Koike v. Board of Water Supply*, 352 P.2d 835, 839 (Haw. 1960) ("The essence of a moral obligation is that it arises out of a state of facts appealing to a universal sense of justice and fairness, though, upon such facts no legally enforceable claim can be based."); *Bellamy v. Oklahoma Farm Mortgage Co.*, 278 S.W. 180, 182 (Tex. App. 1925) (nothing prevented the defendants from "convert[ing] into a legally enforceable obligation that which they were already morally bound to pay").

[8] As is generally true elsewhere, in Alabama the statute of limitations is an affirmative defense, not an element of the plaintiff's claim. *E.g., Special Assets, L.L.C. v. Chase Home Finance, L.L.C.*, 991 So. 2d 668, 675 (Ala. 2007).

could not represent a "right to payment" because the obligation could not be enforced in civil proceedings but only by threatening the probationer with revocation. 495 U.S. at 558-59. The Supreme Court did not regard this difference in "enforcement mechanism" as significant. *Id.* at 559-60. Its statement that a right to payment is "nothing more nor less than an enforceable obligation" signifies only that a right to payment is legally enforceable however the law chooses to enforce it—by civil litigation or otherwise. The *Davenport* Court's reliance on legislative history to show that the Code "contemplates that all *legal obligations* of the debtor . . . will be able to be dealt with in the bankruptcy case," *id.* at 558 (emphasis added, internal quotes omitted), further reflects that it used "enforceable obligation" only in Mr. Black's sense of an interest recognized and protected by law. Moreover, *Davenport* expressly recognizes that the Code's definitions of "claim" and "debt" are the "broadest possible," *id.* at 558, 564 (internal quotes omitted), and a definition of the embedded term "right to payment" that excludes obligations exposed to a limitations defense patently is not the broadest possible. Finally, to read *Davenport* as the plaintiff desires would directly contradict *Travelers'* pronouncement that the parameters of a right to payment are defined by state law, not federal law. In short, *Davenport* cannot plausibly be read for the proposition that a "right to payment" as contemplated by Section 101(5) ceases to exist the moment the statute of limitations expires.[9]

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[9] Nor do later Supreme Court cases quoting *Davenport's* "enforceable obligation" language support such a proposition. *NextWave* quoted *Davenport* only to support its conclusion that "a debt is a debt, even when the obligation to pay it is also a regulatory con-

There are yet other reasons to conclude that the Code permits a creditor to file a proof of claim knowing the claim is time-barred under Alabama or similar law. For example, Section 101(5) defines a claim to include a right to payment that is "contingent" or "unmatured." Even though the Code expressly recognizes that such claims are unenforceable (because no right to payment has yet ripened),[10] it includes them in the definition of a claim. That is, the Code expressly contemplates the filing of proofs of claim on presently unenforceable claims.[11]

This is underscored by the Code's procedure for addressing proofs of claim. If no party in interest objects, the claim is allowed as a matter of course. 11 U.S.C.

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dition." 537 U.S. at 302-03. *Cohen* quoted *Davenport* only to support its conclusion that "[a]n award of treble damages is an 'enforceable obligation' of the debtor, and the creditor has a corresponding 'right to payment.'" 523 U.S. at 218. *Johnson* quoted *Davenport* only to support its conclusion that "a mortgage interest that survives the discharge of a debtor's personal liability is a 'claim' within the terms of § 101(5)." 501 U.S. at 83.

The Eleventh Circuit appears to have quoted this portion of *Davenport* just once, in support of its conclusion that "a judgment requiring payment of punitive and compensatory damages for a common cause of fraudulent conduct is a 'debt' as defined by the Bankruptcy Code in § 523(a)." *In re: St. Laurent*, 991 F.2d 672, 679 (11th Cir. 1993). Nothing in *St. Laurent* suggests the restrictive definition proposed by the plaintiff.

[10] 11 U.S.C. § 502(b)(1) (upon objection, the Bankruptcy Court "shall allow such claim . . . except to the extent that [inter alia] such claim is unenforceable . . . for a reason other than because such claim is contingent or unmatured").

[11] *E.g., Bendall v. Lancer Management Group, LLC*, 523 Fed. Appx. 554, 558 (11th Cir. 2013) ("Contingent rights to payment need not be currently enforceable in order to constitute a claim.").

§ 502(a). The objections a party in interest may raise include that the "claim is unenforceable," *id.* § 502(b)(1), which would be unnecessary if proofs of claim on unenforceable claims were prohibited to begin with. Since one ground of unenforceability is the expiration of the limitations period,[12] the Code clearly contemplates the filing of proofs of claim on claims barred by the statute of limitations, with such claims to be allowed without objection or disallowed upon objection.

Finally, the plaintiff's restrictive definition of a claim is at odds with practice under the prior bankruptcy code, and she offers no sound basis for believing Congress rejected that practice when it enacted the Code. "In 1978, after almost 10 years of study and investigation, Congress enacted a comprehensive revision of the bankruptcy laws," known as the Bankruptcy Act of 1978. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Among the many changes worked by the 1978 revision was the adoption of the current definition of a "claim." *In re: Keeler*, 440 B.R. 354, 361 (Bankr. E.D. Pa. 2009). Previously, "a claim had to be both proved and allowed in order for a creditor to re-

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[12] "Section 502(b)(1) . . . is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy." *Travelers*, 549 U.S. at 450. Legion are the cases disallowing claims under Section 502(b)(1) based on a limitations defense. Recent examples include *In re: Paterno*, 2015 WL 735919 (9th Cir. BAP 2015); *In re: Lewis*, 517 B.R. 615, 622 (Bankr. E.D. Va. 2014); and *In re: Archdiocese of Milwaukee*, 515 B.R. 579, 585-86 (Bankr. E.D. Wis. 2014); *In re: Mazyck*, 521 B.R. 726, 730-31 (Bankr. D.S.C. 2014); *In re: Washington*, 2014 WL 5714586 at *13 (Bankr. D.N.J. 2014); *In re: Morgan*, 2014 WL 5449491 at *2 (Bankr. E.D. Tenn. 2014).

ceive a distribution." *Id.*[13] Under the previous regime, "it has been held in a number of cases that a debt may be provable, even where the defense of the statute of limitations is good as against an action brought in the state courts . . . ." *In re: Kuffler*, 153 F. 667, 668 (E.D.N.Y. 1907); *accord Hargadine-McKittrick Dry Goods Co. v. Hudson*, 122 F. 232, 235 (8th Cir. 1903) ("Debts are not the less provable, within the meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance."); *In re: Solomons*, 2 F. Supp. 572, 573 (S.D.N.Y. 1932) ("[T]he defense of the statute of limitations cannot be deemed properly to be an obstacle to the allowance [of a claim] unless it be interposed by some one . . . ."). The staleness of a debt did not affect its provability because "[t]he statute of limitations is a defense, and not a part of the affirmative claim." *In re: Kuffler*, 153 F. at 668. The debt was owed, and could thus be proved, even though ultimate allowance of the claim might be denied if the limitations defense were properly raised.

"We will not read the [1978] Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Davenport*, 495 U.S. at 563. "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," and "[t]he Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Kelly v. Robinson*, 479 U.S. 36, 47 (1986) (internal quotes omitted); *accord*

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[13] More precisely, the debt had to be proved and the claim on the debt allowed.

In re: St. Laurent, 991 F.2d 672, 679-80 (11th Cir. 1993). The plaintiff has identified nothing in Section 101(5) or its legislative history suggesting that Congress, in adopting the "broadest possible" definition of "claim," intended to overturn the longstanding rule that a limitations defense becomes relevant only after proofs of claim are filed, when the Bankruptcy Court (previously the referee) considers whether to allow an asserted claim. Any such argument would appear to be untenable.[14]

"Based upon the broad definition of a claim found in section 101(5)(A), and based upon the provisions of section 501, which affords all entities that hold claims the statutory entitlement to file a proof of claim, numerous courts have upheld the right of an entity to file a proof of claim, even if that claim is clearly barred by the applicable statute of limitations." *Keeler*, 440 B.R. at 363. For the reasons set forth above, the Court adds its voice to this chorus.[15]

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[14] Because the statute of limitations is an affirmative defense that is lost if not properly asserted, there is a sense in which a time-barred claim is legally enforceable when the proof of claim is filed, subject to becoming unenforceable only later, if and when the defense is raised. Under this view, filing a proof of claim on a time-barred claim would be proper under the Code even accepting the plaintiff's position that the claim must be enforceable when the proof of claim is filed. Because, as discussed in text, the Court rejects the plaintiff's position, it is unnecessary to consider this possibility.

[15] Other choristers include *United States v. Moriarty*, 8 F.3d 329, 334 (6th Cir. 1993) ("[U]sing the Bankruptcy Code's definition of the term 'claim' as a guide to interpret the term 'claim' in the federal priority statute, we conclude that the United States continues to have a 'right of payment,' and thus a 'claim,' against the debtor even though the United States is barred by the statute of limitations from bringing an action against the debtor for money damages."); *B-Real,*

In summary, except where expiration of the limitations period extinguishes the debt under applicable state law, the Code permits creditors to file proofs of claim in Chapter 13 proceedings on debts known to be time-barred, while the Act prohibits debt collectors from engaging in such conduct.[16] There is thus an obvious tension between the Act and the Code. The questions become whether that tension rises to the level of an irreconcilable conflict and, if so, how that conflict is to be resolved.

The answer to the second question is straightforward. "'Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict

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LLC v. Rogers, 405 B.R. 428, 431 (M.D. La. 2009) ("[T]he Bankruptcy Code itself contemplates a creditor filing a proof of claim on a time-barred debt and the Bankruptcy Court disallowing such claim after objection from the debtor."); *In re: Claudio*, 463 B.R. 190, 195 (Bankr. D. Mass. 2012) ("[A] proof of claim based on a stale claim will be deemed allowed under § 501(a) unless the affirmative defense is raised in a filed objection.") (internal quotes omitted); *In re: Andrews*, 394 B.R. 384, 388 (Bankr. E.D.N.C. 2008); *In re: Williams*, 392 B.R. 882, 886 (Bankr. M.D. Fla. 2008) ("The creditor's right to file a claim is not impacted by whether the statute of limitations has run...."); *In re: Varona*, 388 B.R. 705, 723-24 (Bankr. E.D. Va. 2008); and *In re: Simpson*, 2008 WL 4216317 at *2 (Bankr. N.D. Ala. 2008) ("The claims allowance process of the Bankruptcy Code contemplates that time-barred claims may be filed and expressly preserves the statute of limitations as a defense and a ground for disallowance of the claim.").

[16] A "creditor" is defined in pertinent part as "[an] entity that has a claim against the debtor." 11 U.S.C. § 101(10)(A). The plaintiff admits that the defendant purchased the subject debt, (Doc. 1 at 2), and the discussion in text establishes that the defendant has a "claim" despite the running of the limitations period. The defendant is thus a creditor under the Code.

constitutes an implied repeal of the other one.'" *EC Term of Years Trust v. United States*, 550 U.S. 429, 435 (2007) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). The Act has not been amended in any relevant respect since its 1977 enactment, while the Code dates from no earlier than 1978. Thus, and as the plaintiff acknowledges, in case of irreconcilable conflict the Act must yield to the Code.[17]

The first question requires more discussion. The plaintiff insists there is no irreconcilable conflict because the defendant "can easily comply with both the Bankruptcy Code and the [Act] by simply refraining from filing proofs of claim premised on time-barred debts." (Doc. 21 at 3; *accord id.* at 12 n.10, 16). The defendant argues that the two are in irreconcilable conflict "because [the Code] expressly prescribes the conduct allegedly prohibited by the [Act]." (Doc. 17 at 3).

The plaintiff relies for her position on *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). In *Randolph*, the defendant sent the debtor two dunning letters after the debtor's Chapter 13 petition had been filed and her

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[17] The Supreme Court has occasionally suggested that the later-enacted statute must or should also be the more specific statute. *E.g., Smith v. Robinson*, 468 U.S. 992, 1024 (1984). The parties do not invoke this line of authority and, in any event, the Code is plainly the more specific in the only respects relevant to this lawsuit. While the Code specifically addresses the filing of proofs of claim on stale debts, the provisions of the Act on which the plaintiff relies do not reference proofs of claim at all but merely prohibit in general terms the use of deceptive, misleading, unfair or unconscionable means of collecting debts.

plan confirmed.[18] The Act prohibits false representations that a debtor is required to pay a debt immediately, and it also prohibits writing the debtor directly when she is represented by counsel, while the Code prohibits debt-collection attempts in violation of the automatic stay. Although the defendant's conduct was thus prohibited under both regimes, the debtor's remedies were different, with the Act imposing liability on a strict-liability basis (subject to a due-care defense) and the Code restricting the recovery of damages to willful violations of the stay. *Id.* at 728-29. In this context, the Seventh Circuit ruled that the statutes were not in irreconcilable conflict because "it is easy to enforce both statutes, and any debt collector can comply with both simultaneously." *Id.* at 730; *see also id.* at 731 ("Overlapping statutes do not repeal one another by implication; as long as people can comply with both, then courts can enforce both.").

Randolph addresses the situation where both statutes impose obligations on a party.[19] In that context, it makes sense to frame the inquiry as whether the party can "comply" with both statutes, because each statute requires compliance with its corresponding obligation, and if the party can comply with its obligation under one statute only by failing to comply with its obligation under

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[18] Because the three consolidated appeals in *Randolph* were "similar in material respects," the Court "use[d] one as an illustration." 368 F.3d at 728.

[19] As does *Simon v. FIA Card Services, N.A.*, 732 F.3d 259, 279 (3rd Cir. 2013), which the plaintiff also cites in support of her position. (Doc. 21 at 12 n.10). And as do the dozen or so lower court decisions cited by the plaintiff as following *Randolph*—all of which involve obligations under the Act and under the Code's automatic stay and/or discharge injunction provisions. (*Id.* at 9-11).

the other, the obligations are in irreconcilable conflict. *E.g., Department of Transportation v. Public Citizen*, 541 U.S. 752, 766-67 (2004) ("If it were truly impossible for [the agency] to comply with both § 350 and § 13902(a)(1) [both of which imposed "mandates"], then we would be presented with an irreconcilable conflict of laws.").[20]

The ability to "comply" with both statutes, however, is not the proper test when, as here, the case does not concern a comparison of the obligations imposed by one statute with the obligations imposed by another but rather a comparison of the obligations imposed by one statute with the rights conferred by another. In such a case, to speak of mutual compliance is nonsensical, because one does not "comply" with a right, one exercises it. The plaintiff is not urging that the defendant "comply" with both the Act and the Code, she is insisting that the defendant comply with the Act by surrendering its right under the Code to file a proof of claim on a time-barred debt. This is not the vindication of both statutes, it is the negation of one by the enforcement of the other. A clearer demonstration of irreconcilable conflict would be difficult to imagine.[21]

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[20] *See also Simon*, 732 F.3d at 280 ("If, as the Simons argue, a § 1692e(11) claim could arise from the fact that the . . . letters and subpoenas did not include the 'mini-*Miranda*' notice, the [defendant] would violate the automatic stay provision of the Bankruptcy Code by including the notice or violate the [Act] by not including the notice. This conflict precludes allowing a claim under § 1692e(11) . . . .").

[21] Several sister courts in the Seventh Circuit, relying on *Randolph*, have determined that the Code does not preclude an action under the Act based on filing a proof of claim on a time-barred debt.

The plaintiff's other primary authority is *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014). In *POM Wonderful*, the label on the defendant's juice blend product prominently displayed the words "pomegranate blueberry" even though those juices represented only 0.5% of the product. The plaintiff sued under the Lanham Act for unfair competition in the form of a false or misleading product description. The defendant argued that the plaintiff's suit was precluded by the Food, Drug and Cosmetic Act ("FDCA"), the implementing regulations of which apparently permitted use of the label. *Id.* at 2233-34. The Supreme Court disagreed, ruling that the Lanham Act (which "protects commercial interests against unfair competition") and the FDCA (which "protects public health and safety") serve to "complement each other in the federal regulation of misleading labels." *Id.* at 2238, 2241. The plaintiff argues that the contradictory treatment by the Act and the Code of proofs of claim on stale debts does not show irreconcilable conflict because, as in *POM Wonderful*, the statutory schemes "serve two separate purposes." (Doc. 21 at 16).

The decision in *POM Wonderful* does not stand for the proposition that there can be no irreconcilable conflict between statutes when they serve different purpos-

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E.g., Patrick v. Pyod, LLC, 39 F. Supp. 3d 1032, 1034-35 (S.D. Ind. 2014); *In re: LaGrone*, 525 B.R. 419, 423-24 (Bankr. N.D. Ill. 2015); *In re: Brimmage*, 523 B.R. 134, 139 (Bankr. N.D. Ill. 2015); *Robinson v. eCast Settlement Corp.*, 2015 WL 494626 at *2 (N.D. Ill. 2015). These decisions generally rely on the defendant's ability to "comply" with the Code by declining to file a proof of claim. As set forth in text, the Court concludes that this is not a proper expression of the test for irreconcilable conflict in the present context. Nothing in these opinions undermines the Court's conclusion.

es. Nor could it, since it did not address the "high standard" of "irreconcilable conflict" to begin with but considered only how to "reconcile or harmonize" the two statutes. 134 S. Ct. at 2237.[22] Even ignoring this threshold difficulty, the plaintiff has not explained, and the Court cannot apprehend, how two mutually exclusive statutory provisions can be rendered compatible simply by noting that Congress had different purposes in mind when enacting them. Suppose one statute authorizes all citizens to wear white shirts and another forbids all citizens to wear white shirts. Can it seriously be contended that these provisions are reconcilable because the purpose of one is to promote good taste and the purpose of the other is to promote good health? The difference in purpose may explain why the conflict exists, but it does not remove the conflict.

It is of course true that legislative history may eliminate what would otherwise be an irreconcilable conflict by revealing an intent to restrict the meaning or scope of a facially clear statutory provision. *E.g.*, *Watt v. Alaska*, 451 U.S. 259, 266, 273 (1981) ("declin[ing] to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress" and finding from legislative history that Congress intended the new term "minerals," which "by its literal terms applies to the facts before us," to have a narrower meaning compatible with the existing statute). But the plaintiff has pointed to no indication that Congress intended the per-

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[22] The Supreme Court found it unnecessary to assess the existence vel non of irreconcilable conflict because the defendant could not prevail even under the lower standard. *Id.* The plaintiff's insistence that *POM Wonderful* was analyzed and decided under irreconcilable conflict principles, (Doc. 21 at 15), is simply incorrect.

mission it granted in the Code to file proofs of claim on stale debts to be qualified or withdrawn when the creditor is a debt collector. Simply pointing to *Randolph's* description of the Act as "regulating how debt collectors interact with debtors" and of the Code's "principal subjects" as "what assets are made available to which creditors and how much is left for debtors," 368 F.3d at 731—which is all the plaintiff offers, (Doc. 21 at 16)—reflects no congressional intent for the Code to mean something less than what it plainly says.

Statutory provisions are in irreconcilable conflict when "there is a positive repugnancy between them or . . . they cannot mutually coexist." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976); *accord J.E.M. Ag Supply*, 534 U.S. at 143. Thus, for example, when two different limitations periods purport to apply to the same situation, they are in irreconcilable conflict. *EC Term of Years Trust*, 550 U.S. at 435 ("We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under § 7426(a)(1) with the notion that the same challenge would be open under § 1346(a)(1) for up to four years."). Here, as long as state law preserves a right to payment after the limitations period expires, the Code authorizes filing a proof of claim on a debt known to be stale, while the Act (as construed by *Crawford*) prohibits that precise practice. Because, as to creditors under the Code that are also debt collectors under the Act, those contradictory provisions cannot possibly be given effect simultaneously, the provisions are positively repugnant and cannot mutually coexist. They are thus in irreconcil-

able conflict.[23] And because there is irreconcilable conflict, the Act must give way to the Code.[24]

CONCLUSION

For the reasons set forth above, the defendant's motion to dismiss is **granted.** This action is **dismissed with prejudice.** Judgment shall be entered accordingly by separate order.

DONE and **ORDERED.**

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[23] In *United States v. Devall*, 704 F.2d 1513 (11th Cir. 1983), "[t]he Social Security Act's anti-assignment provision purport[ed] to prohibit the assignment of social security benefits with very limited exceptions, while the Bankruptcy Code purport[ed] to authorize direct income deductions from the Social Security Administration." *Id.* at 1515. Because "the conflict between the Bankruptcy Code and the Social Security Act is apparent and cannot be reconciled without limiting one to accommodate the other," the Court "conclude[d] that the provision of the later-enacted Bankruptcy Reform Act must prevail over the more general anti-assignment provision of the Social Security Act." *Id.* at 1515, 1518. The present situation parallels that in *Devall*, and with like result.

[24] The defendant has also cited and discussed authorities that, largely as a matter of policy, would preclude any action under the Act that so much as touches upon matters also addressed by the Code (such as the discharge injunction), and others that would permit actions on the periphery of bankruptcy but preclude those implicating conduct "inside" the bankruptcy system. Because the plaintiff's action is clearly barred due to the irreconcilable conflict between the specific provisions of the Act and Code at issue, the Court need not consider these more sweeping approaches.

APPENDIX D

11 U.S.C. 101(5)(A) provides in relevant part:

In this title the following definitions shall apply:

* * *

(5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; * * *.

11 U.S.C. 501(a) provides in relevant part:

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest. * * *

11 U.S.C. 502 provides in relevant part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the

United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured; * * *.

11 U.S.C. 558 provides in relevant part:

The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

15 U.S.C. 1692e provides in relevant part:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. * * *

15 U.S.C. 1692f provides in relevant part:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law. * * *

Federal Rule of Bankruptcy Procedure 3001 provides in relevant part:

(a) Form and content

A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

* * *

(c) Supporting information

* * *

(3) Claim based on an open-end or revolving consumer credit agreement

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.
* * *

Federal Rule of Bankruptcy Procedure 9011 provides in relevant part:

* * *

(b) Representations to the court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated

below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. * * *